91-1200

NO. _____

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1991

DISCOVERY NETWORK, INC., et al.,
Respondents,

against

THE CITY OF CINCINNATI,
Petitioners.

Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

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Dated: January 11, 1992

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QUESTIONS PRESENTED

1. Whether the decision below, affirming the decision of the District Court that the statutory scheme of the City of Cincinnati violated plaintiff's First Amendment rights, is in conflict with decisions of the Seventh and Eleventh Circuit and not justified under this Court's decision in *Central Hudson Gas & Electric Co.* v. *Public Service Commission of New York*, 447 U.S. 557 (1980).

2. Whether the decision below, which requires the City of Cincinnati to afford Equal First Amendment protection to both commercial and non-commercial speech publications which are distributed through the use of boxes placed in the public right of way is inconsistent with this Court's decision in *Metromedia* v. *City of San Diego*, 453 U.S. 490 (1987).

PARTIES

The parties to the proceeding in the Sixth Circuit Court of Appeals are:

1. The City of Cincinnati, defendants-appellants in the court below.
2. Discovery Network, Inc., doing business as Discovery Center, plaintiff-appellee in the court below.
3. Harmon Publishing Company, plaintiff-appellee in the court below.

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PETITION FOR WRIT OF CERTIORARI

OPINIONS BELOW

The opinion of the Court of Appeals for the Sixth Circuit is printed in petitoner's appendix at pages 1a-10a. It is reported at 946 F.2d 464 (6th Cir. 1991). The opinion of the United States District Court for the Southern District of Ohio is printed in petitioners' appendix at pages 1b-17b.

JURISDICTION

The judgment of the Court of Appeals for the Sixth Circuit was entered on October 11, 1991.

This Court's jurisdiction is involved under 28 U.S.C. § 1254(1).

STATEMENT OF THE CASE

Plaintiff Discovery Network, Inc., doing business as Discover Center, is an Ohio corporation that provides non-credit educational, recreational and social programs to interested persons in Cincinnati, Ohio for various fees. In order to sell its programs Discovery Network publishes a free "magazine" nine (9) times per year. Approximately one-third (1/3) of these "magazines" are given away to pedestrians through metal dispensing devices placed on the sidewalk in thirty-eight locations in the City of Cincinnati, Ohio.

Plaintiff Harmon Publishing Company is a New Jersey corporation registered and doing business in Ohio as a foreign corporation, which publishes and distributes free "magazines" which advertise real estate for sale in various locations. Approximately fifteen (15) percent of these "magazines" are distributed to pedestrians through the use of red plastic dispensers in twenty-four (24) locations on the public sidewalks of Cincinnati, Ohio.

"Home Magazine" published by plaintiff Harmon Publishing Company, consists primarily of listings and photographs of residential properties available in the Greater Cincinnati area, but occasionally includes information about market trends and other real estate matters. Discovery Network, Inc.'s publication contains information about the courses and programs offered at Discovery Center and is intended to directly promote registration in those courses and programs. Both publications are merely advertisements focused upon attracting customers. Neither publication is a "newspaper."

Pursuant to Section 714-23 of the Cincinnati Municipal Code, the City of Cincinnati prohibits the distribution of all publications that constitute "commercial handbills," as defined in Section 714-1-C of the Cincinnati Municipal Code, on public property. Sections 911-17 and 862-1 of the Cincinnati Municipal Code, however, specifically authorize the distribution of newspapers in the public right of way.

On or about March 8, 1990 the City of Cincinnati, through its Director of Public Works, notified both plaintiffs that their publications constituted commercial handbills and ordered plaintiffs to remove their dispensing devices from the public right of way. The plaintiffs appealed the decision of the Director of Public Works to a three-member appeals committee but the decision of the Director of Public Works was upheld. Thereafter, on June 1, 1990 plaintiffs filed suit in the United States District Court for the Southern District of Ohio, Western Division, pursuant to 42 U.S.C. § 1983 claiming that the City of Cincinnati's regulatory scheme violated plaintiffs' First and Fourteenth Amendment rights of free speech and due process and seeking declaratory and injunctive relief as well as attorneys' fees.

At trial, Mr. Robert Richardson, principal city architect, testified on behalf of the City of Cincinnati. Mr. Richardson stated that among his duties he is responsible for the design and upkeep of the "streetscape" which consists of the public right of way and sidewalk area. It encompasses the sidewalk paving, lighting systems, landscaping or trees, plus any street furniture or hardware along the City right of way. In designing a streetscape system aesthetics are an important consideration. In fact, one of the major purposes for designing streetscapes is to improve the appearance of the area in order to impress visiting business people and tourists. Another major purpose for designing a streetscape is to support private development. Since the City is in competition with other cities to attract development and retain business, keeping the public portions of the streets aesthetically pleasing is important to the City's continuing vitality.

Dispensing devices such as those utilized by plaintiffs, detract from the effectiveness of the streetscaping plans. Streetscapes are designed, starting with the lighting systems and what amount of light is needed in relation to where foundations are or may be situated. Traffic signals are also an important consideration. Everything, including parking signs, parking meters, trash receptacles, and transfomer boxes, is in-

corporated into the streetscape. However, dispensing devices are not designed into the system. The devices are often randomly placed, interfering with crosswalks and handicap ramps, and are also attached to light poles with bare chains which cause the poles to rust. In Mr. Richardson's opinion, therefore, dispensing devices such as those utilized by plaintiffs, detract from the aesthetics of the streetscape.

Mr. Thomas Young, City Engineer, also testified at trial on behalf of the City of Cincinnati. Mr. Young stated that the engineering division is charged with designing and regulating the use of the public right of way including streets, sidewalks, bridges, and other structures within the right of way. In Mr. Young's opinion, the type of dispensing device utilized by plaintiffs may detract from the safety of the right of way in several respects. First, they may be placed within, or too close to, crosswalks so that they may hinder pedestrian traffic. Second, they may also obstruct handicap ramps. Third, they obstruct the visibility of motorists and pedestrians, particularly small children who are pedestrians. Last, they may be placed so that they generally restrict the use of the sidewalk.

The United States District Court for the Southern District of Ohio (Spiegel, J.) held that the application of Cincinnati's statutory scheme violated plaintiffs' First Amendment rights of free speech and consequently violated 42 U.S.C. Section 1983. The District Court ruled in the City's favor on the due process claim. (1b).

The District Court found that plaintiffs' publications constituted commercial speech since both publications propose commercial transactions and are primarily advertisements. Neither publication contains noncommercial speech that is inextricably intertwined with commercial speech. (6b). Therefore, the test advanced by this Court in *Central Hudson Gas & Electric Corp. vv. Public Service Comm'n of New York*, 447 U.S. 557 (1980), controlled. (7b).

The Court found that the City of Cincinnati may regulate publication dispensing devices pursuant to its substantial

government interest in promoting safety and aesthetics on or about the public right of way under *City Council* v. *Taxpayers for Vincent*, 466 U.S. 789 (1984). (7b). However, the District Court found that the prohibition of commercial handbills on a public right of way is an "excessive means" by which to accomplish the governmental objectives of safety and aesthetic appeal. (8b). Noting that the number of commercial handbill dispensers on Cincinnati's public rights of way was small in comparison to the number of newspaper dispensing devices, the Court stated that commercial speech dispensers affected public safety and aesthetics in "only a minimal way." (8b). The District Court also noted that other communities chose to deal with safety and aesthetic problems by regulating the size, shape and color of various dispensing devices. The District Court held that the City of Cincinnati's statutory scheme did not reasonably fit the governmental objectives of safety and aesthetics sought to be promoted, as required by *Board of Trustees of State University of New York* v. *Fox*, 492 U.S. 469 (1989). (8b). The parties had previously stipulated that plaintiff's advertisements concerned lawful activities and were not misleading.

The Sixth Circuit Court of Appeals affirmed the decision of the District Court. (17a). The Court, in fact, went beyond the holding of the District Court and held that commercial speech may be regulated differently than non-commercial speech only when the regulations deal with the content of the speech itself, or with distinctive effects that the content of the speech will produce. (10a). The Court noted that *Metromedia, Inc.* v. *City of San Diego*, 453 U.S. 490 (1981) held that a San Diego ordinance similar in effect to the City of Cincinnati's ordinance was a permissible regulation of commercial speech, but since *Metromedia* was a plurality opinion on that issue the Sixth Circuit Court did not consider the case binding on that point. (10a at n. 9).

The Court went on to state that all commercial speech regulations that had been upheld sought to ban speech which was itself believed to be inherently false or misleading, or the

regulation sought to alleviate adverse effects allegedly caused by and directly flowing from the type of speech regulated. (11-12a). Since the City of Cincinnati's statutory scheme was not directed toward either of these objectives, the scheme did not "reasonably fit" the governmental objective sought to be advanced absent some content based restriction. (13a). However, the Sixth Circuit held that the City would have to treat both commercial and noncommercial publications similarly. (14a). No preference for noncommercial speech due solely to its noncommercial nature is permitted by the Sixth Circuit Court's decision. Rather, commercial and noncommercial publications must be afforded equal First Amendment protection absent a content based restriction.

Further, the Court held that the City's statutory scheme did not qualify as a reasonable time, place or manner restriction, since it was not "content neutra'." (14a). In so holding the Court noted that the City could not treat dispensing devices distributing advertisements differently from devices distributing commentary or pubic affairs. (15a).

REASONS FOR GRANTING THE WRIT

I.

THE OPINION BELOW CREATES A CONFLICT BETWEEN CIRCUIT COURTS AS TO THE CORRECT INTERPRETATION OF *CENTRAL HUDSON* AND THE DEGREE OF FIRST AMENDMENT PROTECTION TO BE AFFORDED COMMERICAL SPEECH.

The decision below is in conflict with the Seventh Circuit decision in *Chicago Observer, Inc.*, v. *City of Chicago*, 929 F.2d 325 (7th Cir. 1991), and the 11th Circuit decision in *Don's Porta Signs, Inc.* v. *City of Clearwater*, 829 F.2d 1051 (11th Cir. 1987), which treat advertising material differently from noncommercial speech for purposes of First Amendment protection. Resolution of this conflict is vital for proper application of the Central Hudson test. In many cases, interpretation of this test will be outcome determinative. The case is also significant for the City of Cincinnati since there is increasing competition between commercial publications and noncommercial publications for a finite number of spaces upon the public right of way. The City of Cincinnati must have some principled basis for discriminating between requests from commercial and noncommercial publications, or it will be forced to treat these publications in an equal manner, giving each publication an equal degree of First Amendment protection, and affording no preference to noncommercial speech publications.

In *Chicago Observer, Inc.* v. *City of Chicago*, 929 F.2d 325 (7th Cir. 1991), the Seventh Circuit upheld an ordinance of the City of Chicago, Illinios, banning off-premises ads attached to newsracks. In *Chicago Observer*, plaintiff newspaper distributed its publication through the use of box-type dispensing devices. *Id.* at 326. The boxes served as billboards for businesses unrelated to the newspaper. The

advertising posters faced pedestrian traffic, *Id.* The boxes themselves were referred to by the *Observer* as AD-BOXES. Advertising messages were displayed through a plexi-glass display. *Id.* at 327.

On July 12, 1990 the City Council of the City of Chicago enacted an ordinance which significantly banned off-premises ads on the public way, including off-premises ads attached to newsracks. *Id.*

The Seventh Circuit upheld the ordinance as a permissible restriction of commercial speech. Citing *City Council* v. *Taxpayers For Vincent*, 466 U.S. 789 (1984), the Court held that cities may curtail visual clutter for aesthetic and safety reasons. *Id.* at 328. The City may conclude that large newsracks may reduce the quality of life. The Court noted that Chicago was not seeking to regulate the viewpoint of publications, it was concerned only with size and advertising. The Court rejected the *Observer's* argument that the ads could be regulated only as part of a comprehensive beautification plan, and noted that alternative channels of communication were open. *Id.* at 328.

The Sixth Circuit, however, would require the City of Cincinnati to regulate the content or viewpoint of commercial speech publications by banning only those which are perceived as having some ill effect upon the populace. Furthermore, the Sixth Circuit would seriously impair Cincinnati's ability to curtail visual clutter for aesthetic and safety reasons. The only factual difference between the two situations is that the *Observer's* ads were attached to the outside of the boxes, whereas plaintiff's advertisements are located within their boxes. This factual difference is of no legal significance.

Similarly, in *Don's Porta Signs, Inc.* v. *City of Clearwater*, 829 F.2d 1051 (11th Cir. 1987), the Eleventh Circuit upheld a City of Clearwater ordinance which banned the use of portable signs. In applying the *Central Hudson* test the Court noted that a partial solution to a City's safety or aesthetic

problems may directly advance the City's goals. *Id.* at 1053. The Constitution, the Court noted, does not require a city to choose between curing all of its aesthetic problems or curing none at all. *Id.*

Furthermore, the Court noted that the total ban on portable signs did not violate the fourth prong of the *Central Hudson* test. *Id.* at 1054. The Court noted:

> "If the City has a sufficient basis for believing that billboards are unattractive, then obviously the most direct and perhaps the only effective approach to solving the problems they create is to prohibit them." *Id.* (citing *Metromedia, Inc.* v. *City of San Diego*, 453 U.S. 490, 508 (1981).

The Sixth Circuit, however, would not permit the City of Cincinnati to ban advertising boxes even assuming the City has a sufficient basis for believing that such boxes are unattractive. Rather, the City must devise some less restrictive method of addressing its concerns in order to establish a reasonable fit between its objectives and its regulatory means. Additionally, the Sixth Circuit decision forces the City of Cincinnati to address all of its aesthetic concerns, or none at all. The Sixth Circuit stated:

> If commercial speech has a high value in the *Fox* calculus absent the two specific circumstances, then Cincinnati's ordinance cannot be a 'reasonable fit.' Plaintiffs will bear a very heavy burden by being completely deprived of access to the city streets. Discovery currently distributes 33% of its magazines through newsracks banned by the ordinance, Harmon, 15%. The benefit gained by the city, on the other hand, is miniscule. Plaintiffs own only 62 of the between 1,500 and 2,000 newsracks currently on city streets. As commercial speech has public and private benefits apart from the burdens directly placed on Discovery Network and Harmon, the burden placed on it by Cincin-

> nati's ordinance cannot be justified by the paltry gains in safety and beauty achieved by the ordinance.

This sort of balancing test is not indicated by the case law. Furthermore, a governmental body would be prevented from addressing only one aspect of its safety and aesthetic concerns, since attacking only a small portion may result in only a "paltry" gain or a "miniscule" benefit forcing the body to address all of its concerns or none at all.

The Sixth Circuit's opinion, therefore, creates a conflict between the circuits as to the interpretation of the First Amendment, particularly with respect to the *Central Hudson* test. In doing so, moreover, the Court below erred, neglecting prior decisions of this Court and according unnecessary protection to commercial speech at the expense of noncommercial speech.

II.

THIS CASE POSES AN IMPORTANT QUESTION OF FEDERAL LAW WHICH THE SIXTH CIRCUIT COURT OF APPEALS HAS DECIDED IN A WAY THAT CONFLICTS WITH THE APPLICABLE DECISIONS OF THIS COURT.

The Sixth Circuit Court of Appeals erred in requiring the City of Cincinnati to treat commercial and noncommercial speech equally with regard to distributing publications upon the public right of way. Significant in this regard are this Court's decisions in *Ohralik* v. *Ohio State Bar Assoc.*, 436 U.S. 447 (1978), and *Metromedia, Inc.* v. *City of San Diego*, 453 U.S. 490 (1981).

There is a distinction drawn between the First Amendment protection to be afforded to commercial, as opposed to noncommercial speech. As this Court noted in *Ohralik* v. *Ohio State Bar Assoc.*:

> To require parity of constitutional protection for commercial and noncommercial speech alike could invite dilution, simply by a leveling process of the face of the amendment's guarantee with respect to the latter kind of speech. Rather than subject the First Amendment to such a devitalization, we instead have afforded commercial speech a limited measure of protection, commensurate with its subordinate position in the scale of First Amendment values, while allowing modes of regulation that might be impermissible in the realm of noncommercial expressions. 436 U.S. at 456.

The test for constitutionality of a commercial speech regulation is set forth in *Central Hudson Gas & Electric Corp.* v. *Public Service Comm'n of New York*, 447 U.S. 557 (1980). A governmental restriction on commercial speech is valid if: 1) the commercial speech concerns lawful activity and is not misleading; 2) regulation advances a substantial governmental interest; and 3) the regulation reaches no fur-

ther than necessary to accomplish the legitimate governmental objective. *Id.* 447 U.S. at 563-66. This test does not require that the regulation be the least restrictive means available to further the interest. *Board of Trustees of State University of New York* v. *Fox*, 492 U.S. 469 (1989). This Court stated in *Fox*:

> "None of our cases invalidating the regulation of commercial speech involved a provision that went only marginally beyond what would adequately have served the governmental interest. To the contrary, almost all of the restrictions disallowed under *Central Hudson's* fourth prong have been substantially excessive. *Id.* 492 U.S. at 479.

This Court also noted in *Fox* that courts should not second-guess the legislature as to what constitutes an adequate measure as long as the legislative decision is reasonable. *Id.*

In *Metromedia, Inc.* v. *City of San Diego* this court held that San Diego's ban on signs carrying non-commercial advertising was violative of the First and Fourteenth Amendments. The fact that the City valued commercial messages relating to onsite goods and services more than it valued commercial communications relating to offsite goods and services did not justify prohibiting an occupant from displaying its own non-commercial messages or those of others. *Id.* 453 U.S. at 512-13. This court stated:

> "Insofar as the city tolerates billboards at all, it cannot choose to limit their content to commercial messages; the city may not conclude that the communication of commercial information concerning goods and services connected with a particular site is of greater value than the communication of non-commercial messages." *Id.* at 513.

Further, this court held that the ordinance was a permissible restriction on commercial speech under the test established by *Central Hudson*. *Id.* at 512. Seven justices of this Court concurred in this portion of the holding (Justice White,

Justice Steward, Justice Marshall, Justice Powell, Justice Rehnquist, Justice Stevens, and Chief Justice Burger).

However, the Sixth Circuit explicitly ignores the holding of *Metromedia* because it is a plurality opinion and therefore not technically binding. (10a at n.9) Instead, the Sixth Circuit develops its own test based upon the perceived ill effects of the content of commercial speech sought to be regulated. *Central Hudson* does not require governmental bodies to examine the content of commercial speech sought to be regulated.

Further, the Sixth Circuit would mandate that the City of Cincinnati treat commercial and non-commercial publications alike for purposes of regulating their impact on the safety and aesthetics of the public way. *Metromedia* and *Ohralik* would appear to forbid this parity, and, in fact, would require preference for the non-commercial publication.

CONCLUSION

If the City of Cincinnati must treat commercial and non-commercial publications equally for regulatory purposes, it is quite possible that a commercial publication will be afforded limited sidewalk space to the exclusion of a non-commercial publication, such as a newspaper. In that instance, commercial speech would enjoy a higher degree of First Amendment protection than non-commercial speech. This appears contrary to all of the Court's prior precedent in this area.

Respectfully submitted,

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APPENDIX

RECOMMENDED FOR FULL TEXT PUBLICATION
Pursuant to Sixth Circuit Rule 24

No. 90-3817

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

DISCOVERY NETWORK, INC. and HARMON PUBLISHING CO.,
Plaintiffs-Appellees,

v.

CITY OF CINCINNATI,
Defendant-Appellant.

ON APPEAL from the United States District Court for the Southern District of Ohio

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Decided and Filed October 11, 1991

Before: KRUPANSKY and BOGGS, Circuit Judges; and DUGGAN, District Judge.*

BOGGS, Circuit Judge. The case involves the constitutionality of Cincinnati's ordinance prohibiting the distribution of commercial handbills on public property. This ordinance effectively grants distributors of "newspapers," such as the *Cincinnati Post*, *USA Today*, and the *Wall Street Journal*, access to the public sidewalks through newsracks, while denying that same access to distributors of "commercial handbills." The district court

*The Honorable Patrick J. Duggan, United States District Judge for the Eastern District of Michigan, sitting by designation.

rendered a judgment preventing enforcement of this ordinance because it violates the first amendment. The city appealed, arguing that the ordinance was constitutionally permissible as a regulation of "commercial speech" because of the "lesser protection" such speech is afforded under the first amendment. Because we believe that "commercial speech" only receives lesser first amendment protection when the governmental interest asserted is either related to regulating the commerce the "commercial speech" is promoting, or related to any distinctive effects such commercial activity would produce, and neither governmental interest is asserted here, we affirm the district court.

I

Plaintiffs are publishers of publications distributed throughout the Cincinnati metropolitan area. Discovery Network publishes a magazine that advertises learning programs, recreational opportunities, and social events for adults. Harmon Publishing publishes and distributes *Home Magazine*, which lists houses and other residential real estate for sale or rent. Both plaintiffs use newspaper dispensing devices ("newsracks") placed on public right-of-ways to distribute their publications.

Both plaintiffs had been given permission by the city to place newsracks along public right-of-ways to distribute their publications according to Amended Regulation 38.[1]

[1]The Amended Regulation reads in pertinent part as follows:

1. All devices located within the public right-of-way for the purpose of dispensing newspapers must be shown on a site plan of the immediate vicinity of the device . . . . The site plan and request to place newspaper vending device [sic] in public right-of-way [sic] must be presented to and approved by the City Manager or his designee prior to the placement of the device . . . .

3. Placement of the newspaper dispensing device must be such that it is not accessible from that part of the right-of-way normally reserved for vehicular traffic and does not obstruct normal pedestrian traffic, interfere with handicap access, create driver sight distance problems or otherwise create a public nuisance nor shall the method of attachment allow the device to be moved after placement to create these problems . . . .

6. The owner/operator of newspaper dispensing devices within the public right-of-way must register a responsible contact person . . . with the City Manager . . . . This contact person shall be able to respond in a reasonable time to problems relative to the enforcement of these rules and regulations.

Their status changed, however, in February 1990 when the City Council passed a motion requiring the Department of Public Works to enforce the existing ordinance prohibiting the distribution of "commercial handbills" on public property. *Cincinnati Municipal Code* § 714-23.[2] Plaintiffs brought suit under 42 U.S.C. § 1983, requesting declaratory and injunctive relief. This case ultimately came before the district court for an evidentiary hearing on two issues: whether the regulation violated plaintiffs' first amendment rights, and whether the city's mechanism for appealing the administrative decision to enforce the ordinance violated plaintiffs' right to due process.

The court held that hearing on July 9, 1990. In that hearing, the city contended that the newsracks pose aesthetic and safety problems for the city. The aesthetic

[2]A "commercial handbill" is defined as:

any printed or written matter, any sample or device, dodger, circular, leaflet, pamphlet, paper, booklet or otherwise reproduced original or copies of any matter of literature:

(a) which advertises for sale any merchandise, product, commodity or thing; or

(b) which directs attention to any business or mercantile or commercial establishment, or other activity, for the purpose of either directly or indirectly promoting the interest thereof by sales; or

(c) which directs attention to or advertises any meeting, theatrical performance, exhibition or event of any kind for which an admission fee is charged for the purpose of private gain or profit.

Cincinnati Municipal Code § 701-1-C.

problems arise because of the non-uniform design and color schemes of the different types of newsracks. The safety problems arise because the racks are placed near busy streets, especially near crosswalks and bus stops. They are also attached by chains to city fixtures, such as lightpoles, causing the fixtures to rust. However, there are currently no city regulations establishing any safety or aesthetic standards for newsracks.

Neither the City Architect nor the City Engineer could distinguish the commercial from the non-commercial newsracks. In fact, the Architect testified that the city's aesthetic concerns would be alleviated by an ordinance regulating the color and size of all newsracks. Both witnesses seemed primarily concerned about the potential proliferation of the total number of newsracks as a result of newsracks distributing commercial speech. The Engineer testified that the only areas in which commercial newsracks differed from non-commercial newsracks was in the potential for proliferation, and in the enhanced first amendment protection accorded to devices dispensing non-commercial publications. He believed such proliferation was likely because he had received four requests for permits from commercial publishers for newsrack permits in the prior two years, the first such requests he had ever received.[3] The Architect's testimony followed the Engineer's, as he believed that permitting plaintiffs' newsracks to remain would send a signal to other commercial publishers that newsracks were a permissible way to distribute the publications, thereby

[3]This argument rests on the assumption that there is an infinite number of commercial publishers who might seek permits, but only a finite number of non-commercial publishers. In light of the growing nationalization of newspapers in this country, that assumption is somewhat tenuous at best. The city provided no direct evidence regarding the increase in the number of non-commercial publishers dispensing their wares through newsracks. However, the Architect testified that "it was not very long ago that the *Cincinnati Post* and the *Cincinnati Enquirer* were the only ones with dispensing devices on the City streets." We take judicial notice of the fact that *USA Today*, the *New York Times*, the *Wall Street Journal*, and the *Business Courier* all have dispensing devices on the corner across from the Federal Courthouse.

increasing the number of racks.

The court ruled in favor of the city on the due process claim, but in favor of the plaintiffs on the first amendment claim. The court reached many conclusions of law: that the publications were commercial speech within the meaning of the first amendment because they proposed commercial transactions in the form of advertisements;[4] that commercial speech was entitled to first amendment protection where, as here, the activities promoted were lawful and the speech itself not inherently misleading; and that the ordinance would be measured against the four-part test announced by the Supreme Court in *Central Hudson Gas & Electric Corp. v. Public Service Comm'n of New York*, 447 U.S. 557, 566 (1980). That test provides that a government regulation will be upheld if it (1) regulates commercial speech; (2) promotes a substantial governmental interest; (3) directly advances that interest; and, (4) is not more extensive in its regulation of speech than is necessary to serve that interest. *Id.*

The court focused its analysis on the last part of that test. The court applied the Supreme Court's interpretation

[4]In this case, plaintiffs do not question the contours of the delineation between "commercial" and "non-commercial" speech. We will thus adopt and adhere to that terminology, although we find it somewhat anomalous to denominate as "non-commercial" institutions such as the *New York Times* and Gannett (publisher of the *Cincinnati Post*), each of which has assets and revenues in the billions of dollars, and profits in the many millions of dollars.

Obviously, a quite significant part of the space in "newspapers" is devoted to purely commercial activities, while publications such as plaintiffs' may (and certainly could easily) contain some editorial material, such as comments or articles on education or real estate matters. The first amendment by its terms does not make this distinction; it protects "speech." An analogous practice, deciding on content-based grounds which beliefs merit classification as "religion" protected by the establishment and free exercise clauses of the first amendment, has been severely limited by courts to avoid impermissible government interference into protected activity. *See United States v. Seeger*, 380 U.S. 163 (1965); *United States v. Ballard*, 322 U.S. 78 (1944). *See also* G. Stone, L. Seidman, C. Sunstein, and M. Tushnet, *Constitutional Law* 1369-73 (1986).

of the fourth part of the *Central Hudson* test in *Board of Trustees of State University of New York v. Fox*, 492 U.S. 469 (1989). The *Fox* Court stated that a regulation is not more extensive than necessary when it is a reasonable fit between the ends directly advanced by the statute and the means chosen as embodied in the regulation. *Fox*, 492 U.S. at 480. The Court held that the government has the burden of proving the reasonableness of that fit. *Id.*

The district court's analysis led it to conclude that the city's ordinance did not constitute a reasonable fit between its asserted ends and the means chosen. The court held that a complete ban on newsracks distributing commercial speech violated the *Fox* test. Only 62 of the between 1,500 and 2,000 newsracks present on the city's streets belonged to the plaintiffs. Based on the city's concession that newsracks dispensing "non-commercial" papers caused the same problems as those distributing commercial papers, the court held that the regulation was an excessive means to accomplish the stated ends.

Cincinnati timely appealed the court's determination.[5]

II

A

Both parties agree on the legal contours within which this case must be decided. Both parties agree that this case requires the application of the four-part *Central Hudson* test, and the interpretation given by the Supreme Court to the fourth part of that test in *Fox*. Both parties agree that this ordinance satisfies the first two parts of the test: in this case it regulates purely commercial speech,[6]

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[5]The plaintiffs have not cross-appealed from the court's judgment for the city on the due process claim.

[6]However, it should be noted that the ordinance can also be applied to "newspapers." All newspapers advertise products for sale, or direct attention to business establishments for the purpose of directly or indirectly promoting the sales thereof (restaurant or theater reviews), or direct attention to events of any kind for which an admission fee is charged for the purpose of private profit (Reds or Bengals games).

and Cincinnati's interests in street safety and city aesthetics are substantial. As it is clear that the ordinance directly advances the purposes asserted, we have only one issue before us: Does Cincinnati's ordinance banning the distribution of commercial handbills along city streets and sidewalks prescribe a "reasonable fit" between the ends asserted and the means chosen to advance them? We hold that it does not.

B

In establishing the "reasonable fit" requirement, the Court in *Fox* attempted to draw a middle ground between greater and lesser review of a regulation of commercial speech. The Court expressly rejected imposing either a "least restrictive means" or a "rational basis" standard of review on regulations of commercial speech. *Fox*, 492 U.S. at 479-81. The Court rejected the least restrictive means approach as inconsistent with its prior commercial speech jurisprudence, and rejected the rational basis approach because "[t]here it suffices if the law could be thought to further a legitimate governmental goal, without reference to whether it does so at inordinate cost." *Fox*, 492 U.S. at 480. The Court described its "reasonable fit" approach as one "that represents not necessarily the single best disposition but one whose scope is 'in proportion to the interest served'. . . . Here we require the government goal to be substantial, and the cost to be carefully calculated." *Id.* We presume that the cost referred to by the *Fox* Court is that which would accrue because of the burden placed on the commercial speech, and that the *Fox* test requires that such costs must be outweighed by the benefits of the asserted regulation. We can only make that calculation if we know what value the Court has placed on commercial speech, and it is to that consideration that we now turn.

C

Commercial speech has unquestionably been protected by the first amendment since the Supreme Court in *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748 (1976), held that the Court's prior offhand statement in *Valentine v. Chrestensen*, 316 U.S. 52 (1942), that "purely commercial advertising" was not protected did not establish an exception to first amendment protection. The Court recognized in *Virginia Citizens* that commercial speech, though it may not touch upon the highest topics of human existence (indeed, much protected speech does not), is important to the public welfare. The Court noted in *Virginia Citizens* that speech uttered solely for economic motives has high value to those who listen to it. "As to the particular consumer's interest in the free flow of commercial information, that interest may be as keen, if not keener by far, than his interest in the day's most urgent political debate." *Virginia Citizens*, 425 U.S. at 763. In recognizing the importance of commercial speech to private economic activity, the Court was once again affirming that the "right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge" is "essential to the orderly pursuit of happiness by free men." *Board of Regents of State College v. Roth*, 408 U.S. 564, 572 (1972) (quoting *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923)). The Court recognized that having made this decision, one with which we have no quarrel, commercial advertising is essential because it conveys information that permits each person to decide which trades and economic decisions are best for that person. *See Virginia Citizens*, 425 U.S. at 764. "Therefore, even if the First Amendment were thought to be primarily an instrument to enlighten public decisionmaking in a democracy, we could not say that the free flow of information does not serve that goal." *Id.* at 765. As such, commercial speech also has a high value to the society as well.

The Court did not mean to free commercial speech from

all regulation and create some sort of an advertiser's paradise. The Court noted that time, place, and manner restrictions could be applied to commercial speech, provided that such restrictions are content-neutral. *Virginia Citizens*, 425 U.S. at 771. False and misleading speech could also be regulated or banned, *id.*, including types of commercial speech that may merely be likely to deceive the public. Also, speech proposing illegal commercial transactions may be banned. *Id.* at 772. As at least the prior regulation of speech considered potentially false or misleading would be impermissible if applied to political speech, the Court's decision effectively left commercial speech with lesser protection than that afforded to other types of speech. The Court has continued to adhere to these principles in its subsequent commercial speech jurisprudence. *See Central Hudson*, 447 U.S. at 563-64.

This "lesser protection" afforded commercial speech is crucial to Cincinnati's argument on appeal. Cincinnati argues that placing the entire burden of achieving its goal of safer streets and a more harmonious landscape on commercial speech is justified by this lesser protection. The city correctly notes that many courts have held that a city cannot ban newsracks containing traditional newspapers that comment on current affairs, thereby precluding it from alleviating its problem by completely banning newsracks from the city.[7] It asks us to hold that, in light of that restriction, its policy of banning only newsracks distributing commercial speech is a cost-effective way of alleviating its problem, and therefore meets the *Fox* test.[8]

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[7] *See Sentinel Communications Co. v. Watts*, 936 F.2d 1189, 1196-97 (11th Cir. 1991), and cases cited therein.

[8] Cincinnati also argues that we should defer to the city's decision so long as it is reasonable. It draws this conclusion from two sentences in *Fox* that "we have been loath to second-guess the Government's judgment," *Fox*, 492 U.S. at 478, and that "[w]ithin those bounds [the reasonable fit test] we leave it to the governmental decisionmakers to judge what manner of regulation may best be employed." *Fox*, 492 U.S. at 480. We do not believe that these

The fact that commercial speech is owed less protection than is political speech does not lead to Cincinnati's conclusion that commercial speech has a low value in first amendment jurisprudence. "While [the plaintiff's] speech is primarily commercial in nature, and thereby not subject to all of the traditionally stringent protections of the first amendment, it is nevertheless entitled to substantial protections." *American Motors Sales Corporation v. Runke*, 708 F.2d 202, 208 (6th Cir. 1983). Our examination of that jurisprudence shows us that the lesser value placed on commercial speech only justifies regulations dealing with the content of the speech itself, or with distinctive effects that the content of the speech will produce. In every commercial speech case but one,[9] a regulation upheld as constitutional by the

statements command us to give the city the benefit of the doubt in close cases, as Cincinnati would have it. Rather, they are meant to distinguish the Court's test in *Fox* from the least restrictive means test urged on the Court by the defendant. A least restrictive means test can be satisfied by only one method of regulation, while the *Fox* test can be satisfied by many different methods. If the Court's words mean what Cincinnati argues they do, then the *Fox* Court's subsequent rejection of the fourteenth amendment rational basis test would be a glaring inconsistency.

[9]That one case is *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490 (1981). In *Metromedia*, the Court overturned an ordinance that banned outdoor, off-site advertising displays as an attempt to increase traffic safety and enhance appearance. These interests are very similar to those advanced by Cincinnati in defense of its ordinance. The ordinance at issue in *Metromedia* is also the only regulation of commercial speech that has yet come before the Court where a government attempted to do what Cincinnati is trying so here, regulate a *manner* of conveying commercial speech in order to combat perceived evils wholly unrelated to the commercial content of that speech. Thus, if the majority of the Court had upheld San Diego's statute as a permissible regulation of commercial speech, we would be compelled to reverse the district court. However, only a plurality of the Court found that the San Diego ordinance constitutionally regulated commercial speech. The concurrence specifically -- and vehemently -- disagreed with that conclusion. *See Metromedia*, 453 U.S. at 536 (Brennan, J., concurring). The Court's judgment rested on the ground that San Diego's ordinance was an impermissible content-based restriction on non-commercial speech because it only permitted on-site signs with certain types of speech. *Metromedia*, 453 U.S. at 521. As the Court has stated that "when no single rationale commands a majority, 'the holding of the Court may be viewed as that position taken by those Members who concurred in the judgmen[t] on the narrowest grounds,'" *City of Lakewood v. Plain*

Court fell into one of two groups. In the first, the regulation sought to ban speech believed to be inherently false or misleading.[10] In the second group, the regulation sought to alleviate distinctive adverse effects allegedly caused by and directly flowing from the type of commercial speech regulated.[11] It is clear that Cincinnati's ordinance does not attempt to regulate

Dealer Publishing Co., 486 U.S. 750, 764 n.9 (quoting *Marks v. United States*, 430 U.S. 188, 193 (1977)), we do not view the plurality dicta in *Metromedia* as controlling the outcome of this case.

[10]*See Zauderer v. Office of Disciplinary Counsel of the Supreme Court of Ohio*, 471 U.S. 626 (1985)(regulation banning the use of illustrations in lawyer advertising and banning statements in such advertisements offering legal advice and information as misleading unconstitutional; regulation requiring disclosure that legal "fees" and "costs" are distinct financial obligations in retaining a lawyer to avoid misleading public constitutional); *Friedman v. Rogers*, 440 U.S. 1 (1979)(statute prohibiting the advertisement of optometry practices through trade names as misleading constitutional). The Court also ruled many regulations to be unconstitutional in this group. *See Peel v. Attorney Registration and Disciplinary Comm'n of Ill.*, 110 S. Ct. 2281 (1990)(regulation banning lawyer advertisement of certification by the National Board of Trial Advocacy as misleading unconstitutional); *In re R.M.J.*, 455 U.S. 191 (1982)(regulations limiting the precise names of practice areas lawyers can use in ads and identifying the jurisdictions lawyer is licensed in as misleading unconstitutional); *Bates v. State Bar of Ariz.*, 433 U.S. 350 (1977)(regulation banning lawyer advertisement of prices for routine legal services as misleading unconstitutional).

[11]*See Posadas De Puerto Rico Associates v. Tourism Co. of Puerto Rico*, 478 U.S. 328 (1986)(statute banning advertising of casino gambling directed to Puerto Rico residents to prevent bad effects on morals of residents constitutional); *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447 (1978)(regulation banning in-person solicitation of accident victims for legal business because victims may be coerced into hiring lawyer constitutional); *Young v. American Mini Theatres, Inc.*, 427 U.S. 50 (1976)(regulation setting different zoning regulations for pornographic theatres or bookstores to prevent neighborhood deterioration and crime increases constitutional). The Court has also declared many regulations to be unconstitutional that fall into this category. *See Shapero v. Kentucky Bar Ass'n*, 486 U.S. 466 (1988)(regulation banning solicitation for legal business mailed on a personalized or targeted basis to prevent potential clients from feeling undue duress to hire the attorney unconstitutional); *Bolger, et al. v. Youngs Drug Product Corp.*, 463 U.S. 60 (1983)(statute banning unsolicited mailings advertising contraceptives to aid parental authority over teaching their children about birth control unconstitutional); *Central Hudson* (statute preventing promotional advertisement by electric utility to conserve energy unconstitutional); *Bates v. State Bar of Ariz.*, 433 U.S. 350 (1977)(regulation banning

plaintiffs' speech because it is false or misleading. Therefore, plaintiffs' speech receives lesser first amendment protection only if Cincinnati's reason for regulating it falls into the second group of cases. We can best demonstrate what sort of rationale for regulation is included in the second group by listing a few examples.

In each case where the Court *upheld* a regulation on commercial speech that attempted to burden that speech because of perceived adverse effects on the community, those effects flowed naturally from personal actions fostered by the commercial content of the speech itself. In *Young v. American Mini Theatres, Inc.*, 427 U.S. 50 (1976), Detroit passed a zoning ordinance requiring sexual entertainment establishments to be at least 1000 feet apart from one another. The city believed that permitting such establishments to be closer would foster crime, prostitution, and neighborhood decay. However, the adverse effects of increased crime, prostitution, and neighborhood decay would allegedly occur because of the sort of person attracted to the location of these businesses. Also, in *Posadas de Puerto Rico Associates v. Tourism Co. of Puerto Rico*, 478 U.S. 328 (1986), the Commonwealth banned advertising of casino gambling that was directed at or detectable by Puerto Rican citizens. The reason given was that fostering gambling among Puerto Ricans would disrupt moral and cultural patterns, increase crime and prostitution, and foster organized crime and corruption. These problems, however, would all arise because Puerto Ricans would be more likely to frequent casinos and gamble if they were exposed to casino advertising. In each case, the adverse effect would occur as a direct result of persons acting upon the

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advertisement of prices for routine legal services because of concern that legal professionalism will decline unconstitutional); *Linmark Associates, Inc. v. Township of Willingboro*, 431 U.S. 85 (1977)(regulation banning placement of "for sale" signs in the front lawns of houses in order to prevent the town from losing its integrated racial status unconstitutional); *Virginia Citizens* (statute banning price advertising by pharmacists because of concern that pharmacists' professionalism would decline unconstitutional).

commercial *content* (availability of sexual entertainment, availability of casino gambling) of the speech regulated.

These observations destroy Cincinnati's argument in favor of its ordinance. The defense of that ordinance rests solely on the low value allegedly accorded to commercial speech in general. However, we observe that the Court actually accords a high value to commercial speech except in the two specific circumstances outlined above. Neither of them are present here. Cincinnati is not regulating the content of plaintiffs' publications. Neither is Cincinnati attempting to alleviate a harm caused by the content of the publications. Cincinnati is attempting to place a burden on a particular type of speech because of harms caused by the *manner* of delivering that speech. "We review with special care regulations that entirely suppress commercial speech in order to pursue a non-speech related policy." *Central Hudson*, 447 U.S. at 566 n.9. Cincinnati's non-speech related policy does not survive that special review.

If commercial speech has a high value in the *Fox* calculus absent the two specific circumstances, then Cincinnati's ordinance cannot be a "reasonable fit." Plaintiffs will bear a very heavy burden by being completely deprived of access to the city streets. Discovery currently distributes 33% of its magazines through newsracks banned by the ordinance; Harmon, !5%. The benefit gained by the city, on the other hand, is miniscule. Plaintiffs own only 62 of the between 1,500 and 2,000 newsracks currently on city streets. As commercial speech has public and private benefits apart from the burdens directly placed on Discovery Network and Harmon, the burden placed on it by Cincinnati's ordinance cannot be justified by the paltry gains in safety and beauty achieved by the ordinance. While Cincinnati argues that this is the best option open to it in light of the protection afforded to newsracks dispensing traditional newspapers, "the First Amendment does not permit a ban on certain speech merely because it is more efficient" than other alternatives. *Shapero*, 486 U.S. at 473.

In contrast to Cincinnati's fears, it has many options open to it to control the perceived ill effects of newsracks apart from banning those dispensing commercial speech. To the extent that the use of chains to fasten the newsracks is unsafe, a regulation requiring that all newsracks be bolted to the sidewalk would solve the problem. To the extent that aesthetics are a concern, a regulation establishing color and design limitations upon all newsracks would fit the bill. In fact, counsel for Cincinnati admitted at oral argument that it is currently working on an ordinance of this sort with representatives of traditional newspapers. To the extent that the number of newsracks is disturbing, the city can establish a maximum number of newsracks permitted on city sidewalks, and distribute them either through first-come, first-serve permit rationing or by selling permits to the highest bidder. We are confident that many more options exist for the city, so long as they do not treat newsracks differently according to the content of the publications inside.

III

We also write briefly to explain why Cincinnati's ordinance does not pass constitutional muster on other grounds. The ordinance treats newsracks differently on the basis of the commercial content of the publications distributed. Cincinnati's ordinance, therefore, cannot qualify as a constitutional time, place, and manner restriction because it is not content-neutral. *See Heffron v. International Society for Krishna Consciousness*, 452 U.S. 640 (1981); *Rzadkowlowski v. Village of Lake Orion*, 845 F.2d 653 (6th Cir. 1988); *Wheeler v. Commissioner of Highways, Commonwealth of Kentucky*, 822 F.2d 586, 590 (6th Cir. 1987)("the Billboard Act and regulations apply evenhandedly to commercial and non-commercial speech; they discriminate against no view or subject matter"). A content-neutral speech regulation is one "*justified* without reference to the content of the regulated speech," *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 48 (1986). Cincinnati's argument on

appeal, in contrast, relies on the lesser protection allegedly accorded to commercial speech.[12]

Cincinnati could argue that its ordinance is content-neutral because it was not "adopted . . . because of disagreement with the message [the regulated speech] conveys." *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989). Cincinnati could argue that its enforcement of the ordinance is directed solely at the aesthetic and safety problems caused by newsracks, and therefore is not a content-based decision. However, we cannot accept that argument for two reasons. First, Cincinnati's position is based on the argument that it can treat newsracks distributing commercial speech differently than those distributing commentary on public affairs. Given the wide range of options open to the city to control the perceived ill effects of newsracks without completely banning those distributing commercial speech, we find it

[12]Nor does Cincinnati's ordinance qualify as content-neutral under the "secondary effects" doctrine promulgated by the Court in *Playtime Theatres*. There, the city enacted a zoning ordinance keeping sexual entertainment movie theaters 1,000 feet apart from a residential zone, church, or park, and one mile from any school. The Court in *Playtime Theatres* stated that the ordinance was content-neutral, and therefore reviewable under the time, place, and manner regulation standard, because the primary concern of the city in enacting the ordinance was to control the secondary effects caused by the theaters. *Playtime Theaters*, 475 U.S. at 48. While Cincinnati is attempting to control effects on the city's landscape and fixtures, these effects are neither secondary nor caused by the speech being regulated. In *Playtime Theaters*, the effects -- increased crime and decreased neighborhood quality, among others -- were secondary to the primary effect of the theaters; the dissemination of sexually explicit entertainment. Here, the very existence of different types of newsracks causes aesthetic problems for the city. Additionally, in *Playtime Theaters*, the effects were caused by the nature of the speech disseminated in the theaters. Here, the effects newsracks may have on the city's aesthetic and safety interests are the same for all newsracks, whether the publications inside are commercial or non-commercial speech.

Had Cincinnati produced evidence that the types of newsracks distributing commercial speech caused effects distinct from newsracks distributing newspapers, such as the clogging of downtown streets caused by auto buffs crowding around to obtain the latest issue of *Auto World*, the ordinance may have been constitutional under the secondary effects doctrine. This, however, is not the case.

hard to believe that the city does not in fact favor the distribution of newspapers such as the *Cincinnati Post* and the *Cincinnati Enquirer* on its street corners over that of *Home Magazine*. The failure of the city to even include representatives of plaintiffs -- and other publishers of commercial publications -- in its ongoing discussions with newspaper representatives regarding aesthetic and safety regulations governing newsrack appearance and fastening provides further proof of an unadmitted bias against commercial speech.[13] Second, Cincinnati's hypothetical argument only addresses the enforcement of the ordinance. The ordinance itself was on the books long before this problem supposedly arose. There is no argument advanced that the ordinance's ban on distribution of commercial handbills, by any method, not merely by newsracks, was not directed against commercial speech based on its content.[14]

Nor can the ordinance pass muster as a valid content-

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[13]The Architect's testimony is illuminating on this point.

> Q: Does the City have means to deal with the proliferation of non commercial publishers who are seeking City permits?
>
> A: The City is attempting to work cooperatively with the non commercial publishers to place the devices in an orderly manner and in some cases to agree to certain standard devices, particularly in the center business district.
>
> Q: Can't those very same regulations be applied to commercial publishers?
>
> A: They could if commercial publications were considered legal.

[14]Cincinnati's ordinance would not pass muster even if it met the requirement that it be content-neutral. The second part of the time, place, and manner standard is that the regulation be "'narrowly tailored to serve a significant governmental interest.'" *Rock Against Racism*, 491 U.S. at 796 (quoting *Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 293 (1984)). The ordinance is not narrowly tailored because there are many options available to the city that would address its aesthetic, safety, and proliferation concerns without placing the significant burden on commercial speech that the ordinance does. *See supra*, at pp. 12-13. None of these options would be less effective in promoting the asserted interests than is the complete ban on distribution of commercial handbills. *See Rock Against Racism*, 491 U.S. at 799-800.

based restriction. "Content based restrictions 'will be upheld only if narrowly drawn to accomplish a compelling governmental interest.'" *Barnes v. Glen Theatre, Inc.*, 111 S. Ct. 2456, 2474 (White, J., dissenting) (quoting *Sable Communications of Cal., Inc. v. Federal Communications Comm'n*, 492 U.S. 115, 126 (1989)). This standard has been interpreted to require a government to choose the least restrictive means to further the governmental interest. *Sable Communications*, 492 U.S. at 126. The ordinance is clearly not the least restrictive means, as it places a substantially greater burden on commercial speech than is necessary to alleviate the city's aesthetic and safety concerns.

IV

For the foregoing reasons, the judgment of the district court is AFFIRMED.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

No. C-1-90-437

DISCOVERY NETWORK, INC., et al.,
Plaintiffs,
vs.
CITY OF CINCINNATI,
Defendants.

FINDINGS OF FACT AND CONCLUSIONS OF LAW
(Filed August 23, 1990)

This matter came before the Court for an evidentiary hearing on July 9, 1990. This is a civil action brought pursuant to 42 U.S.C. § 1983. The plaintiffs allege that defendant City of Cincinnati's statutory scheme prohibiting the distribution of commercial handbills in the public right of way violates plaintiffs' First Amendment right to freedom of speech and Fourteenth Amendment right to procedural due process. The plaintiffs seek declaratory and injunctive relief. The contested issues of law and fact relate to whether plaintiffs' publications are commercial speech, whether defendant's regulatory scheme violated plaintiffs' First Amendment rights, and whether defendant failed to provide a meaningful opportunity for plaintiffs to gain rescission of defendant's directives. We find that plaintiffs' publications constitute commercial speech, that defendant's statutory scheme violates plaintiffs' First Amendment rights, and that defendant did not fail to provide a meaningful opportunity for plaintiffs to appeal the defendant's directives.

In rendering our decision on this matter, we have considered the testimony of the witnesses, the documents admitted into evidence, plaintiffs' trial brief (doc. 9), defendant's trial brief (doc. 6), the proposed findings of fact and conclusions of law submitted by the plaintiffs (doc. 8) and the defendant (doc. 7), and the supplemental proposed findings of fact and conclusions of law submitted by the plaintiffs (doc. 14) and the defendant (doc. 13). In weighing the testimony of the witnesses, we considered each witness' relationship to the plaintiff or the defendant; their interest, if any, in the outcome of the trial; their manner of testifying; their opportunity to observe or acquire knowledge concerning the facts about which they testified; and the extent to which they were supported or contradicted by other credible evidence.

Pursuant to Fed. R. Civ. P. 52, we set forth our findings of fact and conclusions of law as follows:

FINDINGS OF FACT

1. The plaintiff, Discovery Center, is an Ohio corporation that, for a fee, provides non-credit educational, recreational and social programs to interested individuals in the greater Cincinnati, Ohio area.

2. The plaintiff, Harmon Publishing Company, is a New Jersey corporation registered and doing business as a foreign corporation in Ohio which publishes and distributes magazines advertising real estate in various locations throughout the United States, including the greater Cincinnati, Ohio area.

3. Discovery Center promotes and publicizes the nature and availability of its programs by means of a free magazine published nine (9) times per year. Approximately one-third (1/3) of these magazines are distributed to the public through free-standing, metal dispensing devices situated in thirty-eight (38) locations within the City of Cincinnati.

4. Harmon Publishing Company advertises its real estate offerings through its free publication, Home Magazine. Approximately fifteen percent (15%) of those magazines are distributed to the public through free-standing, weighted,

plastic dispensing devices situated in twenty-four (24) locations within the City of Cincinnati.

5. Pursuant to Cincinnati Municipal Code, Section 714-23, the City prohibits the distribution on public property of all publications deemed "commercial handbills" by a city official.

6. Section 701-1-C of the Cincinnati Municipal Code defines "commercial handbills" as follows:

> Commercial handbill shall mean any printed or written matter, any sample or device, dodger, circular, leaflet, pamphlet, paper, booklet or otherwise reproduced original or copies of any matter of literature:
> (a) which advertises for sale any merchandise, product, commodity or thing; or
> (b) which directs attention to any business or mercantile or commercial establishment, or other activity, for the purpose of either directly or indirectly promoting the interest thereof by sales; or
> (c) which directs attention to or advertises any meeting, theatrical performance, exhibition or event of any kind for which an admission fee is charged for the purpose of private gain or profit.

7. Section 911-17 and Section 862-1 of the Cincinnati Municipal Code specifically authorize the distribution of "newspapers" on the public right of way. There are fifteen hundred to two thousand (1500 — 2000) newspaper vending devices currently on the public right of way. Neither plaintiff publishes a newspaper.

8. Other communities with similar difficulties promote safety and aesthetics by regulating the size, shape, number or placement of such devices. Such regulation allows the city to control the visual effect of the devices and to keep them from interfering with public safety without completely prohibiting them.

9. On or about February 7, 1989, Discovery Center submitted a "Request to Place Newspaper Vending Devices on Public Right-of-Way" which was approved by an official in the City's department of Public Works.

10. On or about July 13, 1989, Harmon Publishing Company submitted a "Request to Place Newspaper Vending Devices on Public Right-of-Way" which was approved by an official in the City's Department of Public Works.

11. Home Magazine consists primarily of listings and photographs of available residential properties in the greater Cincinnati area but occasionally includes information about market trends or other real estate related matters.

12. The Discovery Magazine primarily contains information intended to directly promote registration in the courses Discovery provides, but it also contains some information about current events, activities and topics which may be of public interest.

13. On or about March 8, 1990, the City, through its Director of the Department of Public Works, notified Discovery Center that its publication constitutes a "commercial handbill," and ordered Discovery Center to remove its dispensing devices from the City's right of way pursuant to Cincinnati Municipal Code Section 714-23. Discovery Center was informed of its right to an administrative hearing with respect to the City's order.

14. On or about March 8, 1990, the City, through its Director of the Department of Public Works, notified Harmon Publishing Company that its publication constitutes a "commercial handbill," and ordered Harmon Publishing Company to remove its dispensing devices from the City's right of way pursuant to Cincinnati Municipal Code Section 714-23. Harmon Publishing Company was informed of its right to an administrative hearing with respect to the City's order.

15. An administrative hearing regarding the City's order as to Discovery Center's dispensers occurred on April 5, 1990.

16. An administrative hearing regarding the City's order as to Harmon Publishing's dispensers occurred on April 26, 1990.

17. Plaintiffs' appeals were heard by the Sidewalk Appeals Committee. The individuals who sat on the Sidewalk Appeals Committee were the City Engineer, the Assistant City Solicitor, and the Director of Public Works or his designee. All of these officials participated directly in the original decision to revoke plaintiffs' permits on the grounds that plaintiffs' publications constitute commercial handbills.

18. Plaintiffs' petitions were denied, and they were requested to remove their dispensing devices.

19. The City of Cincinnati had agreed not to interfere with plaintiffs' dispensing devices until a ruling on the merits of this case is made. Those devices are still present in the public right of way.

CONCLUSIONS OF LAW

1. The test for identifying commercial speech is whether the communications "propose a commercial transaction." *Virginia Pharmacy Bd.* v. *Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 762 (1976).

2. Where commercial and noncommercial speech are "inextricably intertwined," the entire communication is classified as noncommercial. *Riley* v. *National Federation of the Blind of North Carolina, Inc.*, 487 U.S. 781, 796 (1988). Noncommercial aspects of speech are "inextricable" where it is impossible to sell the advertised items without the noncommercial speech or where the noncommercial speech is required to be combined with commercial messages. *Board of Trustees of State University of New York* v. *Fox*, ___ U.S. ___, 109 S.Ct. 3028 (1989).

3. The publications distributed by Discovery Center and Harmon Publishing Company constitute forms of commercial speech. Both publications propose commercial transactions in that they are primarily intended as advertisements. Home Magazine, published by Harmon Publishing, advertises real estate available in the greater Cincinnati area. Discovery Center's publication is intended to advertise for-profit programs offered by Discovery Center. Neither publication con-

tains noncommmercial speech that is inextricably intertwined with the commercial speech. There is no law requiring the editorials in question to be published together with advertisements for educational or social programs or real estate.

4. Commercial speech is entitled to First Amendment protections if it concerns lawful activity and it is not misleading. *Central Hudson Gas & Electric Corp.* v. *Public Service Comm'n of New York*, 447 U.S. 557, 566 (1980).

5. The publications distributed by Discovery Center and Harmon Publishing Company are entitled to First Amendment protections. Both publications concern lawful activity and neither publication is misleading.

6. The City of Cincinnati may regulate publication dispensing devices pursuant to its substantial interest in promoting safety and aesthetics on or about the public right of way. *See City Council* v. *Taxpayers for Vincent*, 466 U.S. 789 (1984).

7. A goverment restriction on commercial speech is valid if "the regulation directly advances the governmental interest asserted, and . . . it is not more extensive than is necessary to serve that interest." *Central Hudson Gas & Electric Co.*, 447 U.S. at 556. This test does not require that the regulation be the least restrictive means available to further the interest. *Board of Trustees of State University of New York* v. *Fox*, ___ U.S. ___, 109 S.Ct. 3028 (1989). Rather, it requires a reasonable " 'fit' between the legislature's ends and the means chosen to accomplish those ends." *Id.* at 3035 (quoting *Posadas de Puerto Rico Assocs.* v. *Tourism Company of Puerto Rico*, 478 U.S. 328, 341 (1986)). The fit must be "one whose scope is 'in proportion to the interest served.' " *Id.* (quoting *In re R.M.J.*, 455 U.S. 191, 203 (1982)).

8. The burden is on the government to affirmatively establish the reasonable fit required. *Id.*

9. Based upon these standards, we find that the City of Cincinnati has failed to affirmatively establish such reasonable fit. Complete prohibition of commercial handbills on any public right of way is an excessive means by which to accomplish the governmental objectives of safety and

aesthetic appeal. The "fit," in this case, is unreasonable. The number of dispensers dispensing commercial handbills (62) on the public right of way is minute in comparison to the total number of dispensing devices on the street (1500 — 2000), and such dispensers effect public safety and aesthetics in only a minimal way. Other communities with similar difficulties promote safety and aesthetics by regulating the size, shape, number or placement of such devices. Such regulation allows the city to control the visual effect of the devices and to keep them from interfering with public safety without completely prohibiting the speech in question. This court has no doubt that the city acted in good faith, here, with the intent only to protect the citizens of Cincinnati. However, freedom of speech is a fundamental constitutional right, and the city acted somewhat overzealously in executing its good intentions. While the City's objectives of promoting safety and aesthetics are substantial, complete prohibition of the devices in question is unreasonable and violative of plaintiffs' fundamental First Amendment rights.

10. A basic requirement of due process is a fair trial before a fair tribunal. *Mathews* v. *Eldridge*, 424 U.S. 319 (1976); *In re Murchison*, 349 U.S. 133 (1955). This rule is equally applicable to administrative agencies which adjudicate issues. *Withrow* v. *Larkin*, 421 U.S. 35 (1975). The fact that the same agency or persons combine both investigative and adjudicative functions does not necessarily create an unconstitutional risk of bias. *Larkin*, 421 U.S. at 47. One who makes such a contention has a "much more difficult burden of persuasion to carry." *Id*. The plaintiff must overcome a presumption of honesty and integrity in those individuals serving as administrative adjudicators. *Id*. The fact that those on the adjudicating committee have previously stated that a request should be denied based on its prior *ex parte* investigation does not necessarily mean that the minds of its members were irrevocably closed to the merits of plaintiffs' arguments. *Id*. at 48.

11. Based upon these standards, we find that the mere fact that the same individuals who made the original decision

also sat on the Sidewalk Appeals Committee is not sufficient to deem the practice unconstitutional.The original decision was based on its prior *ex parte* investigation. The final decision was made by the Sidewalk Appeals Committee after hearing arguments by each plaintiff. There is no allegation that the city officials acted dishonestly or in bad faith. The plaintiffs have failed to overcome the presumption of honesty and integrity in those individuals serving as administrative adjudicators.

CONCLUSION

Accordingly, for the reasons set forth above, we find that the regulatory scheme advanced by the City of Cincinnati completely prohibiting the distribution of commercial handbills on the public right of way violates the First Amendment. However, the manner in which the City currently handles appeals of decisions regarding permits that are denied does not violate the Fourteenth Amendment. Judgment shall be entered in favor of the plaintiff as to the First Amendment issue and for the defendant as to the Fourteenth Amendment issue.

SO ORDERED.

Dated: 8/21/90

/s/ S. ARTHUR SPIEGEL
United States District Judge

AMENDMENT I—FREEDOM OF RELIGION, SPEECH AND PRESS; PEACEFUL ASSEMBLAGE; PETITION OF GRIEVANCES

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

42 U.S.C. § 1983

§ 1983. Civil action for deprivation of rights

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

R.S. 1979; Pub.L. 96-170, § 1, Dec. 29, 1979, 93 Stat. 1284.